

VIRGINIA:
IN THE CIRCUIT COURT OF ARLINGTON COUNTY

Commonwealth of Virginia

v.

Case: CR14-671

Delores O'Brien Heffernan

MOTION TO DISMISS OR, IN THE ALTERNATIVE, RECUSE

PLEASE TAKE NOTICE that at the next scheduled hearing in the above captioned case, the Defendant, Delores O'Brien Heffernan, pro se,¹ will argue this motion to dismiss this case for denial of a speedy and fair trial, or, in the alternative, recusal of the Court. In support of which Defendant states the following:

1. A "Request for Show Cause" was filed on February 21, 2014 by Jason McCandless, Assistant County Attorney on behalf of Arlington County DHS in Arlington civil case no. CJ12-7. *Arlington County Request to Show Cause, filed February 21, 2014.*

2. The Arlington County Request for Show Cause alleged Heffernan violated a "no contact order" because she was alleged to have been seen over one year ago on the evening of February 3, 2014 in a LaPrada public library in

¹ Defendant Heffernan files this motion under her rights to represent herself under *Faretta v. California*, 422 U.S. 806 (1975), and *Stevens v. Commonwealth of Va.*, 57 Va.App. 566, 704 S.E.2d 585 (Va. App., 2011).

Chesterfield County at the same time her now 15 year old granddaughter was brought there and escorted under the close supervision of social workers from the group home where she is forced to live in isolation from her family by Arlington Department of Human Services.

3. Arlington Department of Human Services has placed Heffernan's granddaughter in that group home at Medicaid expense to secure her isolation, rather than placing her in foster care or returning her to her family, to which she is legally entitled under the law.

4. The LaPrada library is located more than *two miles* from the group home that Heffernan's granddaughter lived.

5. The LaPrada library is also near where Heffernan lives in Chesterfield.

6. No actual oral or physical contact is alleged by Arlington County (or anyone else) to have occurred between Heffernan and her granddaughter in this alleged circumstantial social worker-supervised occurrence in the LaPrada library.

Id.

7. As background, Heffernan raised her now 15-year-old granddaughter since she was three days old, and was appointed her guardian by a Maryland Circuit Court.

8. Arlington DHS has represented to the Court of Appeals that Heffernan remains a party with a legitimate interest in her granddaughter.

9. Neither this nor any other court has entered any order terminating that Maryland guardianship.

10. No court has ever ruled that Heffernan is a danger to her granddaughter, nor has any court ever found that her granddaughter seeing her grandmother would cause her any serious harm. To the contrary, Heffernan's granddaughter has been allowed to see her grandmother in Arlington Court on several occasions.

11. The courts have acknowledged, that there was a positive loving relationship between Heffernan and her granddaughter.

12. Heffernan's granddaughter is in Arlington DHS custody because the granddaughter's birth mother (who is also Heffernan's daughter) lost her parental rights in June 27, 2012. *Tackett v. Arlington Dep't of Human Servs.* (Va. App., 2013)

13. At the April 2, 2014 procedural hearing, this Trial Court heard the *Arlington County Request to Show Cause* and granted it. There was no court reporter present at that hearing.

14. At the time, Arlington County asked for unspecified jail time as punishment for the alleged minor infraction of the "no contact order," and this

court agreed that a sentence, if any, upon would be less than six months. As a result, the court treated the *Arlington Request to Show Cause* as criminal contempt, opened a criminal case, and denied Heffernan's request for a jury trial.

15. Up until the grant of the *Motion to Show Cause* and commencement of the criminal case, Heffernan had been represented by Court-appointed counsel Elizabeth Tuomey, including for the entirety of the civil case that led to the original show cause order (which began in December 2012), for the previous case for criminal contempt of that same "no contact order" (which was ultimately held to be without merit and thus dismissed), as well as for appeals to the Court of Appeals of various orders in both cases, including successfully overturning rulings of this court. *E.g. Tackett v. Arlington Dep't of Human Servs.* (Va. App., 2013), *Heffernan v Commonwealth*, Court of Appeals Record Nos. 2103-13-4 and 2102-13-4, and *Commonwealth v. Heffernan*, Arlington Circuit Court Case No. CR13-1445.

16. At the April 2, 2014 hearing Tuomey had argued against the issuance of a show cause order on the *Arlington Request to Show Cause*.

17. After she made that argument, this Court dismissed Tuomey as Heffernan's counsel, over Heffernan's objections, barring Tuomey from further representing Heffernan in this criminal contempt case. The Court claimed Tuomey was "ineffective counsel," and then stated that he was going to impose a

substitute a public defender attorney on Heffernan by the next hearing even though Heffernan objected.

18. The next hearing was the following day, April 3, 2014. There, the Trial Court denied Heffernan's request to act as her own counsel, denied Heffernan's request that her new public defender attorney (who had no experience with the case) withdraw, and denied Heffernan's request to allow her to have her own private counsel. (See, Hearing Transcript at 3-6, April 3, 2014). Under the U.S. Constitutions and Virginia law, Heffernan has a constitutional right to speak on her own behalf and raise her own objections, alongside her court assigned counsel. *Faretta v. California*, 422 U.S. 806 (1975), and *Stevens v. Commonwealth of Va.*, 57 Va.App. 566, 704 S.E.2d 585 (Va. App., 2011).

19. The Trial Court then held Heffernan in summary contempt and required her to she spend four days in jail for when she demanded her right to her own attorney, to represent herself and to have her court-appointed counsel Tuomey to remain as her attorney (See, Hearing Transcript at 3-6, April 3, 2014. and April 8, 2014 Order).

20. The Arlington Commonwealth Attorney Thamos refused to prosecute the *Arlington Request for Show Cause* criminal contempt case. (April 8, 2014 Order and April 2, 2014 Letter of Commonwealth Attorney Theo Stamos to Judge Fiore)

21. Rather than dismiss the case as *nolle prosequi*, the Trial Court actively sought out someone to prosecute Heffernan by appointing Mr. McCandless, Assistant Arlington County Attorney, as “special counsel” to prosecute the case. After the erroneous nature of the Court’s action was pointed out to the Court by Heffernan’s counsel, the Court reversed his decision to appoint McCandless as “special counsel.” See, April 8, 2014 Order, and August 5, 2014 Letter of Judge Fiore to Jason McCandless, Esq. and Helen Randolph, Esq.

22. The Court then recruited the Fairfax Commonwealth Attorney to prosecute Heffernan for the very offense that the Arlington Commonwealth Attorney had refused to prosecute. See, *Order* of October 22, 2014.

23. On November 20, 2014, citing the inability of Heffernan’s granddaughter to testify, the Arlington County Department of Human Service told the Court it had no further interest having the case prosecuted, that it had no other witnesses (other than A.O.), and “moved the Court to cease with proceedings in this contempt case due to the impact having to face the Defendant would have upon the [Heffernan’s grandchild] A.O.” See, *Order* of November 21, 2014. The Court then ordered *ex parte* submissions to the Court by the Department, over the objections of Heffernan’s counsel, asking the Department to “submit all materials to support the Department's conclusion of an adverse impact on A.O. to Arlington County Circuit Court Chambers for an in camera review by the Court, said

materials to be submitted no later than December 29, 2014, and accompanied by a submission from the guardian ad litem, all of which shall be submitted under seal.”

Id. As of the date of this filing, nothing has been placed in the record by either the Court, Arlington County or the Fairfax County Commonwealth Attorney that indicates that an *ex parte* filing has been made with the Court, nor the nature of any materials submitted to the Court by the prosecutor or the Department, in violation of the ethics standards of the Virginia Bar and the Judicial Canons.

24. The Court then ordered that the hearing take place on February 26, 2015 – more than one year after the original *Arlington Motion to Show Cause* was filed. *Id.*

25. Over the objections of Heffernan’s counsel, on February 20, 2015, the Fairfax Commonwealth Attorney sought to delay the case even further, based on the alleged unavailability of a social worker witness. Up until that announcement, the only witness Arlington told the court might appear was Heffernan’s granddaughter. The Court granted the motion and continued the case until April 13, 2015 – *more than a year* after the motion to show cause was granted.

In the Interests of Justice, This Case Should Be Dismissed

26. This case now suffers from fatal “structural errors” caused by Heffernan being denied her right to either represent herself or hire a private attorney, in violation of her Sixth and Fourteenth Amendment rights. *U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 151, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006). There is nothing in the Supreme Court’s limited exceptions that allowed the trial court to limit Heffernan’s right to represent herself here or to have her attorney to continue to represent her. *Faretta*, held that the Sixth and Fourteenth Amendments include a “constitutional right to proceed without counsel when a criminal defendant voluntarily and intelligently elects to do so.” [*Faretta*] 422 U.S., at 807, 95 S.Ct. 2525 (emphasis in original).

27. Secondly, the Arlington Commonwealth Attorney, who is charged with the prosecutorial discretion to prosecute cases in Arlington, had asserted her prosecutorial discretion to not prosecute Heffernan. This Court has overridden the Arlington Commonwealth Attorneys discretionary decision no to prosecute Heffernan by proactively insisting that others (initially Mr. McCandless and later the Fairfax Commonwealth Attorney) prosecute Heffernan. The Trial Court’s action shows extreme prejudice, gives the court a vested interest in Heffernan being found guilty even before any evidence is presented, and clearly demonstrates

a lack of the required independence and separation between the Trial Court and the prosecution.

28. Third, this court has set a trial date of April 13, 2015, which is well beyond the nine-month maximum required for a speedy trial in Virginia Code §19.2-243. The delay has been highly prejudicial to Ms. Heffernan because, despite the required presumption of innocence, she has been severely restricted in her behavior for over a year as the Court placed her under bond with conditions that impede her freedoms and, overall, create for Ms. Heffernan constant anxiety, fear, and concern for her future. *Barker v Wingo*, 407 U.S. at 532, 92 S.Ct. at 2193 (1990). While the Trial Court's and the Fairfax prosecutor's have stretched out this misdemeanor case, Ms. Heffernan has been forced to be "on-call" for six hours travel to and from her home in Chesterfield to come up to Arlington each of the many times this court has held procedural hearings. The charges and the constantly pending and rescheduled trial have cast unnecessary uncertainty on her life, prevented Ms. Heffernan (who is 68 years old and of failing health – including one hospitalization for a stress related physiological illness) from securing long term employment, and prevented her from having deserved stability in her twilight years.

29. Because of the delays in prosecuting this case, its structural errors, and other procedural flaws, the Trial Court's proactive role in the prosecution of

Heffernan, and the discretionary decision of the Arlington Commonwealth Attorney to not prosecute the case, Ms. Heffernan's rights to a speedy and fair trial have been violated and require that the case be dismissed.

In the Alternative, the Court Should Recuse Itself

32. If the Court chooses not to dismiss the case, then, as required by Judicial Canon 3, Subsection E, the Court is respectfully requested to recuse itself from this case.

For the reasons stated herein, the Court is respectfully requested to dismiss the case or, in the alternative, recuse itself from this case.

Respectfully Submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing was served, by email and mail on March 23, 2014, on:

Rachel Roberts, Fairfax County Assistant Commonwealth Attorney
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Janell Wolfe, GAL, 2007 N. 15th St. Suite 100, Arlington, VA 22201

Helen Randolph, Defender, 2300 Clarendon Blvd., Ste. 201, Arlington, VA 22201
